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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/511,388

10/15/2004

Arjen Bot

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EXAMINER

PADEN, CAROLYN A

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

01/21/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/511,388	Applicant(s) BOT ET AL.	
	Examiner Carolyn A. Paden	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 08 January 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5 and 9-11 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5, 9-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Examiner's indication of allowable subject matter in the last office action has been withdrawn because of the discovery of new references. Prosecution of this application continues.

Claims 1-4 and 9-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1 it is unclear if fat is intended to be included or not in step a. An amendment to the claim cancelling "preferable" would overcome the rejection. Claim 1 is in the passive voice so it is unclear what process steps are included or excluded from the process. An amendment to claim 1 converting it into the active voice would overcome the rejection.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4 and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Keefer (4,748,026).

Keefer discloses the preparation of yoghurt. At column 7, starting at line 39 the preparation of the product is disclosed. Here a dairy base is

formed and heated to 130-140F with homogenization. Then the mixture was inoculated with yogurt culture and incubated to a pH of 4.10-4.15.

Then a slurry of vegetable gums and other additives were included and the mixture was homogenized, pasteurized and cooled. The gums included in the process are shown at column 5, lines 48-68 and column 6, lines 24-36.

The claims appear to differ from Keefer in the recitation of the fat and protein content of the dairy base and in the recitation of a non-dairy cream. Milk and milk products are known in the art to contain protein and fat. One of ordinary skill in the art would be able to adjust the protein and fat content of the yoghurt according to the nutrient content desired in the final product. It is appreciated that "non-dairy" is not mentioned but Keefer provides for a variety of ingredients in his yoghurt that are non-dairy ingredients. To the extent that Keefer is not a natural yoghurt one might expect to be considered as a non-dairy spoonable food. The fact that it is not a cream product is not seen to constitute unobviousness because the process steps used to make the product would be expected to produce a creamy product. No unobvious or unexpected result is seen from the homogenization conditions used in the claims when compared to Keefer

Claims 1-5 and 9-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stumbo (3,235,387).

Stumbo discloses sour cream dressing. In example 1 cream with 22% butter fat was pasteurized and homogenized. Then lactic acid starter was added with rennet to form a fermented cream. Then guar gum, locust bean gum and starch were included and the mixture was heated, homogenized and cooled. The claims appear to differ from Stumbo in the recitation of the pH of the product at step c but one of ordinary skill in the art would expect the fermented product in Stumbo to achieve this pH. It is also appreciated that Stumbo uses dairy cream but one of ordinary skill in the art might be expected to adjust the fat or protein content of the sour cream in Stumbo to include non-dairy ingredients. To the extent that the fermented cream includes vegetable biopolymers, the product might be considered to be a non-dairy cream. It is appreciated that the protein content of the cream are not mentioned but dairy cream and fermentation culture would be expect to have protein sufficient to meet the requirements of claim 1. No unobvious or unexpected result is seen from the homogenization conditions used in the claims when compared to Stumbo.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794

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